

231665

ENTERED  
Office of Proceedings

JAN 11 2012

Part of  
Public Record

BEFORE THE  
SURFACE TRANSPORTATION BOARD

Ex Parte No. 706  
REPORTING REQUIREMENTS FOR POSITIVE  
TRAIN CONTROL EXPENSES AND INVESTMENTS

REPLY COMMENTS OF THE  
AMERICAN CHEMISTRY COUNCIL AND  
THE CHLORINE INSTITUTE

The American Chemistry Council ("ACC") and the Chlorine Institute ("CI") respectfully file these reply comments in accordance with the Board's October 13, 2011 decision instituting this proceeding and in response to the opening comments filed on December 12, 2011 by the Union Pacific Railroad Company ("UP") and the Association of American Railroads ("AAR").

The AAR comments and UP comments can, in many respects, be read to support the points made in the ACC-CI opening comments. For example, there is no pressing need for the proposed change in R-1 reporting requirements, because each railroad has the full ability to present evidence on positive train control ("PTC") costs in whatever manner it deems defensible in a particular proceeding. UP and AAR both acknowledge this. AAR notes that railroads "are currently free to separately account for their own PTC costs" and "could voluntarily submit PTC data themselves in Board proceedings" (AAR Opening Comments, p. 9). UP makes the same point, almost verbatim, at page 3 of its Opening Comments. Thus, in the absence of any R-1 change, no railroad would be disabled from assembling any evidence it thought pertinent to its interests in proceedings before the Board.

The AAR claims that individual railroads' ability to keep their own accounts of PTC costs "is no substitute for the clarity the Board could bring to the regulatory costing process through specific Board-prescribed reporting requirements. Yet, as ACC and CI and witnesses Messrs. Crowley and Mulholland showed in the opening comments, the proposed R-1 changes would not bring clarity or uniformity to the reporting process. Rather, because of the lack of specificity in the rules, such changes would simply allow railroads to continue to account for these costs in any way they see fit. Indeed, the only individual railroad that has provided comments in this proceeding is UP, and the record does not show the full diversity of accounting practices that other railroads may engage in, and could continue to engage in even if the rule were adopted. As ACC and CI emphasized in their opening comments, the fact that certain accounts would be created by the proposed changes would not mean that all railroads would put the same types of costs into those categories.

If anything, the AAR and UP comments confirm even more clearly the diversity of railroad accounting practices that would continue to be allowed under the proposed change. In many cases, it appears railroads have not decided how they should account for PTC-related costs. For example, the AAR's Comments at p. 9, fn. 12, give the example of how to account for maintenance expenses on a wayside device that is used partly as part of the PTC system, and states that it will be "difficult to decide" how to treat these expenses. In sum, the supposed clarity and uniformity of the rules is purely illusory, and could prove highly misleading if the R-1 categories were somehow seen as "uniform" and having some sort of official imprimatur.

The AAR (at p. 7) claims that unless the proposed change in the R-1 reports is made, "the Board may be unable to reconstruct the data in a manner that it finds satisfactory, and thus it may be unable to use the data for its own oversight purposes or for future regulatory proceedings." Yet not a single example is offered of types of proceedings that might benefit from reporting PTC costs in the proposed manner, and plainly since railroads are themselves keeping track of PTC expenses, any necessary information could be supplied in individual proceeding if the need arose.

A more telling, and only thinly veiled, suggestion of the need for the R-1 reporting change was offered by the UP at p. 6 of its Opening Comments. The UP states that "UP could provide information about TIH traffic in a PTC version of schedule 755 with little effort at a low cost. The Board would find the information useful in analyzing the impacts of the PTC mandate and in determining whether and how to assign those costs in rate and other proceedings." Now we come close to the truth about why UP and other railroads are so anxious to create "official" reporting categories for PTC costs -- they want to recover these costs from a relative handful of TIH shippers on the theory that the only benefit of PTC expenses is to make shipments safer for TIH shippers.

The Board, for its part, stated in the US Magnesium case that it was not prepared to decide on the basis of a very limited record the extent to which TIH shippers should bear the brunt of PTC costs.<sup>1</sup> Yet implementing the proposed rule would greatly facilitate the clear plans of the railroad parties to seek to recover all or most of their PTC costs from TIH shippers. While in theory shippers can "have their day in court" to show why certain costs should not be allocated to them, or should be adjusted in various ways,

---

<sup>1</sup> US Magnesium, LLC v. Union Pacific Railroad Co., STB Docket No. 42114, opinion served Jan. 27, 2010 at p. 17.

and while R-1 cost may not always be absolutely "set in stone," it is unfortunately true, as ACC and CI pointed out, that once the R-1 egg is scrambled, unscrambling it to parse out inappropriately apportioned costs can prove difficult or impossible. At best, it would amount to a shift in the burden of proof from the railroads to the shippers, even though the Board is ostensibly neutral on the issue of whether such costs should be allocated to TIH or any other category of shippers. This shift in the burden of proof could make it very difficult or impossible for TIH shippers to fight the astronomical rates that UP, at least, appears to have in mind. UP states in its comments (p. 6) that allocating a portion of its PTC costs to the US Magnesium traffic would raise the maximum reasonable rate by \$5,500 per carload.

Plainly, the railroads are trying to push at full speed their storyline that PTC is a special purpose dedicated system that was simply mandated by Congress for TIH and passenger traffic and has no economic benefits. But long before Congress decided to limit the implementation of PTC to lines with TIH or passenger traffic, PTC was recognized as a system that had widespread operational and safety benefits. Very significant and widespread economic benefits are projected to accrue as a result of PTC implementation by multiple independent parties, including the Federal Railroad Administration. The analysis of these benefits is presented in the Crowley and Mulholland verified statement attached to the ACC-CI opening comments, and in the studies appended to that verified statement.

The Board should not allow its good offices to be used as part of this railroad campaign, and should seek a much clearer and more compelling reason to adjust the R-1 accounting categories than that such costs should be recorded "just in case" the Board

ever needs them. Clearly, the railroads have plans to use these costs, and as emphasized above and in the opening comments of ACC and CI, all of the other reasons advanced by the railroads, claiming that the new categories will bring clarity and uniformity, are inaccurate and are simply window dressing for their real aims to shift the burden onto TTH shippers of showing that PTC costs should not be disproportionately allocated to them.

For the foregoing reasons, and those stated in the opening comments submitted by ACC and CI, the proposed changes to the R-1 reports should not be adopted.

Respectfully submitted,

Paul M. Donovan  
LaRoe, Winn, Moerman and Donovan  
1250 Connecticut Avenue, NW  
Washington, DC 20036

Counsel for the Chlorine Institute

A handwritten signature in black ink, appearing to read 'S. N. Stone', written over a horizontal line.

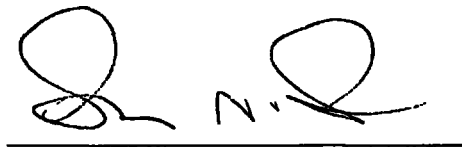
Scott N. Stone  
c/o Patton Boggs, LLP  
2550 M Street, NW  
Washington, DC 20037

Counsel for American Chemistry Council

January 11, 2012

## CERTIFICATE OF SERVICE

I certify that I have, this 11th day of January 2012, served copies of the foregoing reply comments upon counsel for the Union Pacific Railroad Company and Association of American Railroads by first class mail.

A handwritten signature in black ink, appearing to read "S. N. Stone", is written above a horizontal line.

Scott N. Stone